INDEX

page

I. Decisions Sought To Be Reviewed 1

II. Grounds Upon Which Review Is Sought 2

III. Questions Presented For Review 2-5

IV. Constitutional Provisions, Statutes And Regulations.... 5-12

V. Statement Of The Case 12-14

VI. Argument 14-25

VII. Conclusion 25

VIII. Appendix 26-59

1. *Findings of Fact And Conclusions Of Law* of the United Stages District Court 26-33
2. *Amended Judgment* of the United States District Court 34-35
3. *Judgment* of the Ninth Circuit Court of Appeals 36-41
4. *Order Extending Time To File Petition For Writ Of Certiorari* by the Honorable William J. Brennan, Associate Justice of the Supreme Court 42
5. *United States Constitution, Amendment V*.... 43
6. *The Taylor Grazing Act*, (43 U.S.C. § 315 et seq.) 44-59

TABLE OF AUTHORITIES CITED

COURT CASES: page

Benson Mining Smelting Co. v. Alta Mining Smelting Co. 145 U. S. 428 (492) 40

Bishop of Nesqually v. Gibbon, 158 U.S., 15 167 18

Brown v. Hitchcock, 173 U.S. 473 19

Perry v. Udall, 336 F2d 706 (CA 9, 1964) 14, 22, 23, 24, 40, 41

Guinocchi v. United States, 396 U.S. 295 (1970) 40

Green v. Mc Elroy, 360 U. S. 474 (1959) 40

Hawley v. Diller, 178 U.S. 476 19

Hall v. Hickel, 303 F. Supp 723 (D.. Nev. 1969) 20, 41

Hamilton-Brown Shoe Company v. Wolf Brother Co., ... 39

Kern Oil Company et al. v. Clark, 30 L.D. 550, 556, 560, 565, (1901); on review, 31 L.D. 288 (1902) 19

Knight v. United States Land Association, 142 U.S., 161..... 19

Lewis v. Udall 374 F2d 180 (C.A. 9, 1967) 15, 22, 23, 24, 41

Michigan Land and Lumber Co. v. Rust, 168 U.S. 589 19

Mollohon v. Gray, 9th Cir. 413 F2d 349 (1969) 15

Payne v. New Mexico, 255 U.S. 367, 41 S.Ct. 333, 65 L. Ed 860 (1921) 16, 17, 18, 19, 20, 40

Red Canyon Sheep Co. v. Ickes, 98 F2d 308, 318-319 (C.A.D.C. 1938) 23

Sellas v. Kirk, 200 F2d 217, 220 (9th Cir 1952) 20, 37, 41

State of Wisconsin, 65 I.D. 265 .....18, 19, 20

Wilcoxon v. United States, 114 U.S. App. D.C. 203, 207 313 F2d 884, 888 41

Wyoming v. United States, 255 U.S. 489 (1921) 18, 19, 20, 40

United States Constitution, Amendment V 4, 5, 43

STATUTES

The Taylor Grazing Act (48 Stat. 1269) as amended, (43 U.S.C. 315 et seq.) 2, 3, 4, 6, 7, 9, 10, 14, 15, 20, 21, 22 26, 36, 37, 40, 41, 44 to 59 both incl.

43 U.S.C. Sec. 315g(a) 6, 7, 15, 37, 51
43 U.S.C. Sec. 315g(b) 4, 6, 7, 14, 15, 20, 22, 23, 24, 26, 37, 47, 48, 49, 51

43 U. S. C. Sec. 315g(c) 6, 7, 15, 37, 49, 51, 52
43 U.S.C. Sec. 315g (d) 4, 6, 9, 14, 15, 21, 23, 24, 37, 49, 52, 53

43 U.S.C. Sec. 315f 6, 15, 37, 50

Section 11, 36 Stat. 557, 565 16

Isolated Tracts Act, 43 U.S.C. 1171) 7, 14, 22, 23, 41, 56, 57

TABLE OF AUTHORITIES CITED—(Cont.)

5 U.S.C. Sec. 1009 14

28 U.S.C. Sec. 1361 14

28 U.S.C. Sec. 2191 14

46 Stat. 257, (43 U.S.C. Sec. 872) 11, 32

Administrative Procedure Act, Sec. 10 ..... 5, 41

REGULATIONS: page

43 C.F.R. Sec. 146.8(a) 11, 23, 24

43 C.F.R. Sec. 146.3(b) (1954 ed.) 4, 10, 16, 21, 26, 39

43 C.F.R. Sections 146.2, 146.3, 146.4, 146.5, 146.7 ..... 10, 38

43 C.F.R. Sec. 221.10 ..... 11, 24

43 C.F.R. Sec. 221.31 ..... 11, 24

43 C.F.R. Sec. 1844.1 24

43 C.F.R. Sec. 2244.1-4 (2) 10, 24, 38, 39

MISCELLANEOUS: page

State of Wisconsin, 65 I.D. 265 ..... 18, 19, 20

Williston on Contracts, revised edition, Section 835, p. 717 ..... 23, 24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

No. ———

PERLEY M. LEWIS and MILDRED C. LEWIS, his wife,
Petitioners,

vs.

WALTER J. HICKEL, as Secretary of the Interior, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

COMES NOW your Petitioners, PERLEY M. LEWIS and MILDRED C. LEWIS, before this Honorable Court, and respectfully present this Petition for a Writ of Certiorari to have this Honorable Court review the decision of the Ninth Circuit Court of Appeals in its cause entitled PERLEY M. LEWIS and MILDRED C. LEWIS, his wife, Plaintiffs-Appellants vs. WALTER J. HICKEL, a Secretary of the Interior, et al., Defendants, Ninth Circuit Cause No. 23086.

DECISION SOUGHT TO BE REVIEWED

The decision sought to be reviewed was decided June 1, 1970 by the Ninth Circuit Court of Appeals, which was in turn an appeal from a cause entitled PERLEY M. LEWIS, his wife, Plaintiffs, v. STEWART L. UDALL, Secretary of the Interior, et al, Defendants, in the United States District Court in and for the District of Arizona, in cause No. CIV 5003-Phx. Copies of

these opinions are attached hereto and the Ninth Circuit decision may be found in 427 F.2d 673.

II. *GROUNDS UPON WHICH REVIEW IS SOUGHT*

a. The *Findings of Fact and Conclusions of Law* of the United States District Court were rendered May 28th, 1968 (R 214-222) and are attached hereto.

2. The *Amended Judgment* of the United States District Court was rendered May 28, 1968 (R. 223-224) and is attached hereto.

3. The *Judgment* of the Ninth Circuit Court of Appeals was decided June 1, 1970, and is attached hereto.

4. On September 3, 1970 the Honorable William J. Brennen, Jr., entered his *Order Extending Time to File Petition for Writ of Certiorari* to and including September 30, 1970, and it is attached hereto.

5. The statutory provision believed to confer on this Court, jurisdiction to review the Judgment in question by Writ of Certiorari, is 28 U.S.C. Sec. 1254.

III. *QUESTIONS PRESENTED FOR REVIEW*

Your Petitioners respectfully submit that the time has come for the Supreme Court of the United States to exercise its jurisdiction in this case, *not only because of its importance to the litigants, but also because of the great general national importance and specific import to the fourteen western states in order to secure and promote uniformity of decisions as to the land use and the land disposal laws of the United States.*

The question involves the *Taylor Grazing Act* which is the chief land disposal law of the United States *and whether or not the various Secretaries of the Interior have unbridled and unreviewable discretion to interpret and reinterpret this eighteen-section statute contrary to the legislative intent of said statute, contary to prior declarations of the Supreme Court of the United States in respect to land disposal.* That the substance of the deci-

sion of the Courts below in this case, and in prior cases under the *Taylor Grazing Act*, is that the *Taylor Grazing Act* and all eighteen sections thereof, including the numerous methods of disposal and selection of lands for national purpose *is completely discretionary with the Secretary of the Interior and not subject to judicial review.*

The Courts Below, particularly the United States Court of Appeals for the Ninth Circuit, have made a series of decisions over the past decade with regard to the *Taylor Grazing Act* (43 U.S.C. § 315 et. seq.) which is comprised of some eighteen sections covering land segregation, land selection, land classification, land control, administration including collection and disbursement and allocation of monies, land use, land improvement and development, including mining and timbering, land disposal, including permits, leases, sales of land at public auction, exchanges of land between the Federal Government and States, and exchanges of land between the Federal Government and private citizens.*The substance of all of these decisions is that all methods of disposal, classification, control and selection are so discretionary with the Secretary of the Interior that none of his acts are subject to judicial review.*

This then is the important national and regional issue in this case.

The case began 14 years ago June 6, 1956 with an application for exchange of lands under the private exchange Section 8 of *The Taylor Grazing Act* (43 U.S.C. § 315g), under Fred A. Seaton as Secretary of the Interior when Petitioner, LEWIS, was 57 years old. The exchange was lawfully processed under Secretary Seaton and was fully completed by Petitioners, LEWIS, as to their part of the exchange bargain or swap, including conveyance of their lands to the government by November 4, 1959. Two years later the new Secretary Udall issued new policies, appiled them retroactively, and in 1963 issued final decision refusing to issue patent to the selected land and cancelling the exchange. The Government still has title to the LEWIS lands;

Walter J. Hickel is Secretary and Petitioner, LEWIS, is 72 years old.

The specific questions presented to the Court by the appeal in this case are:

1. Whether the Secretary of the Interior's regulations and his interpretions of his own regulations *can defeat the congressional purpose of establishing an exchange* as provided in Sections 8(b) and (d) of the *Taylor Grazing Act*. (43 U.S.C. §315g (b) and (d))

2 .*Whether the congressional purpose* establishing a procedure to exchange land with private citizens under Section 8 of the *Taylor Grazing Act was to create an exchange pursuant to the ordinary law of exchanges*, or was to create an exchange which controverted the law of exchanges and in essence was no exchange.

3. *Whether the Secretary of the Interior in this case Secretary Udall defeated the congressional purpose* of the aforesaid act when he so interpreted and so applied a regulation (43 C.F.R. 146.3(b)) as to change the established and orderly sequence of procedures as set forth in the language of the statute itself to "effect" the exchange *and by this application of authority made the exchange not an exchange at all*, but on the contrary, a so-called exchange with reserve, *the reserve being unilateral* to the government and consisting of *an unbridled no-time-limit right of refusal to consumate the exchange years after the private citizen had conveyed his land* to the United States Government.

4. Whether the Secretary *misconceived his authority* by refusing patent and cancelling this selection lawfully made *and thereby did entrench not only upon the legislated rights* granted by Section 8 of the *Taylor Grazing Act*, but also *deprived the Petitioners, LEWIS, of a property right without due process of law in violation of the Fifth Amendment to the United States Constitution.*

5. Whether the facts of this case and the actions of the Secre-

tary *rendered his actions inequitable* in refusing to issue patents to the Petitioners, LEWIS, *over two years after the government had accepted title to the LEWIS' land* on October 1, 1959, *as whether the Secretary, in equity, was estopped from so exercising his authority* if said authority is even lawful.

6. Whether *it was an abuse of discretion and short of the Secretary's statutory right,* subject to review under the Section 10 of the Administrative Procedure Act, *for the Secretary not to issue the patent to the Petitioners,* LEWIS, *and in this regard* whether or not *the Secretary failed to follow his own rules of procedure.*

7. Whether the Secretary's actions and the lengthy delay in conveying the government's lands to the private citizen, after ordering him to convey and after accepting title to the private citizen's land, was a violation of the statuatory proceedures, the regulations, and in equity the law of exchanges, since his delay initially was merely for the possibility of getting a better bargain with others on another exchange.

8. Whether or not "press releases"of new policies constitute a lawful basis for the Secretary of the Interior to apply those policies retroactively to override the rules and regulations of the Department of the Interior.

9. Whether under the facts of this case the doctrine of *res judicata* applies to prior decisions of the Secretary's own department finding and deciding that the sale was in the public interest when the subsequent contrary decision was made over two years after the Petitioners, LEWIS, transferred their property to the United States Government and was accepted by said Government.

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REULATIONS

Reference to the following shall be found verbatim in the Appendix:

United States Constitution, Amendment V.

43 *U.S.C. Section* 315, dealing with the purpose of *The Taylor Grazing Act*, giving the Secretary of the Interior power to establish grazing districts, providing for the establishment of rights of way upon grazing lands.

43 *U.S.C.* §315*a* which deals with the Secretary's authority to regulate and improve the grazing districts.

43 *U.S.C.* § 315*b* which deals with the issuance of grazing mits upon the grazing district lands and fixing of fees therefore and establishing preferences for the issuance of such permits, and preserving certain other rights of the private citizen in grazing lands.

43*U.S.C.* §315*c* dealing with the building of improvements upon grazing lands by private citizens who are using the lands for grazing purposes.

43 *U.S.C.* 315*d* protecting certain mining interests in and upon grazing lands, including prospecting.

43 *U.S.C.* §315*e* prohibiting the restriction of lawful rights of way upon grazing lands or the ingress or egress over the public lands or the restriction of prospecting, mining, leasing or patenting the mineral resources of the lands.

43 *U.S.C.* §315*f* authorizing the Secretary to use his discre- in examining and classifying lands which have been previously withdrawn as being more valuable or suitable for the production of agricultural crops or some other use or purpose other than for grazing under *The Taylor Grazing Act* and allowing him to make such land available for disposal under the Land Disposal Laws, some of which are under *The Taylor Grazing Act* and involved in this case.

43 *U.S.C.* §315*h* requiring the Secretary of the Interior to cooperate with local stockman's associations and state officials engaged in conservation or propagation of wild-life interests and authorizing the Secretary to accept contributions and administer funds for such purposes.

43 *U.S.C.* §315i dealing with the use and distribution of the

money received including the percentages thereof under the provisions of *The Taylor Grazing Act.*

43 *U.S.C.* §315*j* dealing with the distribution of grazing fees received upon Indian lands.

43 U.S.C. §315*k* authorizing the Secretary of the Interior to cooperate with other governmental departments in carrying out range administration.

43 *U.S.C.* §*l* authorizing the President of the United States by proclamation to transfer lands back and forth between the National Forest and the Department of the Interior, but providing that such transfers will not interfere with his existing rights acquired under any public land laws.

43 *U.S.C.* §1171 the so-called *"Isolated Tracts Act"* which allows the Secretary of the Interior to sell government lands at public auction sales.

43 *U.S.C.* §*m* dealing with and authorizing grazing leases as distinguished from grazing permits, and providing for preferences to be given to owners, homesteaders, lessees or other lawful occupants of contiguous lands, and providing further for preference rights when public lands are restored from a withdrawal.

43 *U.S.C.* §315*n* preserving the police power of the State over the lands included within grazing districts.

43 *U.S.C.* §315*c* dealing with the creation of local advisory boards to help advise the Secretary on the administration of the lands.

The Section of the Taylor Grazing Act involved in this case is Section 8 (43 U.S.C. 315g) *which reads as follows:*

"Sec. 8. (a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.

(b) When public interest will be benefited thereby the

Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue a patent for not to exceed an equal value of surveyed grazing district land of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: PROVIDED, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

"When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

"For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted

school sections shall be a waiver of all of its right to such sections.

"(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: PROVIDED, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surfact of the land as may be deemed necessary. Where mineral reservation are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one-half of the cost of publishing notice of a proposed exchange as herein provided. (43 U.S.C., sec. 315g)"

The regulation promulgated by the Secretary of the interior under this provision of the *Taylor Grazing Act* which the Secretary interpretes as giving him authority to not consumate an exchange even after the government has accepted title to the privately owned lands for the period of two years reads as follows:

43 CFR §146.3 (b) (Now 43 CFR §2244.1-4 (2))

"However, until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States other than an obligation to pay one-half the cost of publication."

The rest of the regulations promulgated under this section of the *Taylor Grazing Act* applicable to this case are as follows:

"§146.2 — Application. (a) Persons . . . desiring to exchange lands pursuant to Section 146.1 should file in the Land Office having jurisdiction over the selected lands an application in duplicate, on Form 4-728, . . .

"(b) The applicant must be legally capable of consummating the exchange, and the application must state that he is the owner of the lands offered in exchange, and that such offered lands are not the basis of any other exchange.

"(c) . . . the application must state that the value of the selected lands does not exceed the value of the offered land.

"(d) No filing fees are required, However, the applicant shall pay one-half of the advertising costs."

"§146.3

" . . .

"(b) The authorized officer, if he has no basis to determine the value of the selected lands exceeds the value of the offered lands, that the exchange is not in the public interest, or that there is other reason not to do so, shall direct publication of the notice of exchange in the newspaper or newspapers designated by him, and require the applicant to submit proof of publication and comply with the provisions of Sections 146.4, 146.5 and 146.7. However, until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed; and the applicant has no contractural or other rights against the United States, and no action taken will create any contractual or other obligation of the United States other than an obligation to pay one-half the cost of publication."

"§146.8 — Approval of Exchange; Rules of Practice to be Followed.

"(a) The proof of publication, conveyance, title evidence and other evidence furnished by the applicant will be examined, and if found satisfactory and no valid objection of hearing to the consummation of the exchange, title to the offered land will be accepted and patent for the selected land will issue.

"(b) Protests against exchanges when filed in the proper office of the Bureau of Land Management will be considered and determined, and the applicant and protestant will be notified accordingly.

"(c) Any person aggrieved by any action of the Manager or the Area Administrator on application for exchange, or a protest against such an application may appeal to the Director, Bureau of Land Management, and from his decision to the Secretary of the Interior pursuant to the rules of practice, Part 221 of this Chapter.

"(d) Should the application for exchange be finally rejected, the evidence of title will be returned to the applicant and a Quit-Claim Deed for the land conveyed to the United States will be issued under Section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. §872."

In addition, there are regulations under 43 CFR dealing with *res judicata* issue raised herein. They are as follows:

"221.10 — Effect of Failure to Appeal. When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall, as to such party, be final and will not be disturbed except for fraud or gross irregularity.

" . . .

"221.31 — Right of Appeal to the Secretary of the Interior. Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on appeal or is an original decision, except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the

party adversely affected shall have failed to appeal from the decision of such official."

Finally, the exchange was really prevented from being consummated by a press release policy of the Secretary of the Interior dated February 14, 1961, *entitled Public Land Conservation Policy announced. This press release policy stated in parts*

"According to the policy statement, lands which cannot properly be developed under existing public land laws will be retained in Federal ownership until the necessary laws can be enacted. The Department will no longer continue to try to force present-day land needs into the unworkable strait jacket of out-dated laws. Proposed legislation to meet present and future needs will be submitted to the Congress in the near future, the Secretary said.

"...

"Private exchanges will not be entertained or consummated except where it is shown that there are compelling reasons to acquire the offered lands to augment long-range Federal resource management programs..." (R. 106)

STATEMENT OF THE CASE

The facts of the case are well set forth in the Finding of Facts and Conclusions of Law of the District Court attached to this Petition. They are briefly as follows:

1. On June 6, 1956, Plaintiffs filed a Private Exchange Application at the Phoenix Land Office seeking to exchange 388.73 acres of their land for 160 acres of Federally owned land.

2. The exchange was recommended and on March 20, 1958, the lands were classified as suitable for exchange and said proposed exchange was declared to be in the public interest.

3. An overriding exchange was filed by one Vantex Land and Cattle Company, hereinafter referred to as Vantex, and after certain proceedings which went up to the Director of the Bureau of Land Management in Washington, D.C., said Director referred both applications back to the Phoenix Land Office by decision of March 20, 1959 and directed the Phoenix Land Office

to determine which exchange was more in the public interest and then stated:

"After such determination has been made, simultaneously, publication of the successful application will be Ordered, and the unsuccessful application rejected to the extent of the conflict."

This decision of the Director was not appealed and after the appeal period had run, the case was returned by the Director to the Phoenix Land Office.

4. On September 23, 1959, the Phoenix Land Office decided that the LEWIS' application for exchange was more in the public interest and the Petitioners, LEWIS, were given sixty days to comply with the procedures set out in the regulations for the completion of the exchange, including the transfer of their lands to the Federal Government.

5. By November 4, 1959, the transfer by the LEWISES of their lands to the United States Government was complete and ever since that date, the United States Government has held these lands.

6. Even though it had not appealed from the decision of the Director of March 20, 1959, Vantex Land later sought further appeals to the Director from the Phoenix Land Office's determination of September 1959 and pending such matters, the Government land was not transferred to the LEWISES even though the Government had accepted title to the 388 acres transferred by the LEWISES to the Government.

7. Meanwhile, on February 14, 1961, the new Secretary of the Interior, UDALL, announced new policies which were not published in the Federal Register. In this announcement the Secretary said:

"The Department will no longer continue to try to force present day land needs into the unworkable strait jacket of outdated laws."

The upshot of such policy was to freeze all land sales and ex-

changes and thus the transfer of the Federal Land to the LEWISES was never consummated.

8. Finally, on November 15, 1961, the acting Manager of the Phoenix Land Office issued a decision and in said decision stated in part:

> "There is no compelling reason to acquire the offered (LEWIS) lands to augment any long-range Federal resource management program, and consummation of the exchange is not in the public interest."

This, even though the LEWIS land had been acquired by the Federal Government over two years prior to this pronouncement.

9. The judicial proceedings in the District Court and the Circuit Court below followed. The District Court's jurisdiction was invoked under 5 U.S.C. §1009 and 28 U.S.C. §1361, as amended by public law 87-748, 76 stat. 744. The Court of Appeals jurisdiction was invoked under 28 U.S.C. §2191.

VI. ARGUMENT

The position taken by the Secretary of the Interior is that disposals under the *Taylor Grazing Act are completely discretionary.*

This case deals with §8(b) and (d) of the *Taylor Grazing Act,* (43 U.S.C. §315g (b) and (d)) which are the statutes giving the Secretary of the Interior authority to acquire private land by exchange. *These same sections set forth the precedure to "effect" such exchange as well as exchanges for state-owned land.*

The Ninth Circuit has previously dealt with other sections of the *Taylor Grazing Act.* In *Ferry v. Udall,* 9 Cir., 336 F. 2d 706 (1964) the Ninth Circuit found that public auctions under the *Isolated Tracts Act,* (43 U.S.C. 1171) which is Section 14 of the *Taylor Grazing Act* was in effect, statutory procedure for an auction with reserve and the Secretary could, by regulation, impose any reserve he wanted to on the sale at public auction,

including the right not to consummate the auction sale until a cash certificate had issued. The Government has cited this case and the subsequent case of *Lewis v. Udall*, 9 Cir. 374 F. 2d 180 (1967) (which has no connection with the case at hand) as indicating that *the entire Taylor Grazing Act* is discretionary and therefore, the Secretary cannot be brought to account by the Courts for the way he disposes of land thereunder.

Again, in the recent Ninth Circuit case of *Mollohan v. Gray*, 9th Cir., 413 F. 2d 349 (1969), the Ninth Circuit erroneously indicated that the provisions of the *Taylor Grazing Act* were "permissive" type statutes and not subject to judicial review. *Such interpretation by the Ninth Circuit should have been restricted to the facts of that case which were dealing with the Secretary's discretion to grant cancelled grazing permits under Sections and under the Taylor Grazing Act.* (43 U.S.C. 315(a) and (b).

The Ninth Circuit applied the same reasoning and logic to the exchange provisions of the *Taylor Grazing Act* (43 U.S.C. 315g(b) and (d)). A careful reading of these sections will show that *Section* 8(d), (43 U.S.C. 315g (d)), *is mandatory* as is Section 8 (c) of the *Taylor Grazing Act* (43 U.S.C. 315 g (c)). Section 8(b) of the *Taylor Grazing Act is both discretionary and mandatory.* The Secretary's discretion under Section 8 (b) arises under the first seven words of that sub-section:

"When the public interest would be benefited thereby . . ."

A classification under Section 7 (43 U.S.C. Sec. 315f) that the land is more suitable for other purposes than grazing can be made, however once this initial classification has been made *and the exchange has been authorized and ordered consummated by the Secretary, the statutory language requires procedures to "effect" the exchange as set forth under Section 8d, the mandatory section, in* like manner for private and state exchanges under both sections 8(b) and 8(c).

But the Government says that they can ignore these statutory

provisions for the reason that 43 CFR §146.3(b) (1954 ed.) which was enforced when this matter arose *allows them to renege on the exchange two years after they have accepted title to the applicant's land.*

Such an interpretation is contrary to prior judicial interpretations of this Court of similar language in land disposal statutes.

As was said by the Surpreme Court of the United States in *Payne vs. New Mexico*, 255 U.S. 367, 41 Sup. Ct. 333, 65 Law. Ed. 680 (1921):

> "But it is said that the selection is 'subject to the approval of the Secretary'. 'No right can become vested, nor equitable title acquired, unless and until his approval is had', and therefore that the rule just stated is not applicable here. *To this we cannot assent, the words 'relied upon' are not peculiar to this land grant, but are found in many others.* Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished, and the land selected, and of approving or rejecting the selection accordingly. The *power conferred is 'judicial in nature'* and not only involves the authority, but implys the duty *'to determine the lawfulness'* of the selections as of the time when the exertion of authority was invoked by the lawful filing of the list of selections' (omitting citations) *and it should be observed that this view has been recognized and applied by the Land Department,* although not with uniformity. (Emphasis aupplied)

Again, in *Payne vs. New Mexico*, 255 U.S. 367, 415 Sup. Ct. 333, 65 Law. Ed. 680 (1921), Congress granted certain lands to New Mexico to support schools, provided, New Mexico would waive its rights to certain other lands granted in lieu thereof select other lands of equal acreage.

However, as expressly stated in the statute not just in the regulations such exchange or lieu selection were to be made "under the discretion and subject to the approval of the Secretary of the Interior . . ." (Section 11, 36 Stat. 557, 565)

New Mexico waived its right to one of its tracts and selected

other land in an area lawfully subject to selection. The Court said:

> "The list conformed to the directions given by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was duly posted and published, proof of publication was submitted and the publishers charge was paid. In other words, . . . *all was done by the State that needed to be done by it to perfect the selection.* The notice did not bring forth any protest or objection . . . The list remained pending . . . until May 16, 1916 (one year two months and five days after initial application was filed) when the Commissioner directed that the selection be cancelled . . . " (Emphasis supplied).

The ground of cancellation was that one of the lands offered by the State in exchange had been eliminated from a national forest by a change in the national forest boundaries. The United States Supreme Court said:

> "*The Courts below rejected that view and held that those officers of the Land Office were required* to give effect to the conditions existing when the selection was made and that, if it was valid then, they were not at liberty to disapprove or conceal it by reason of the subsequent change in the status of the base tract. In our opinion the Courts were right. *The provision under which the selection was made was one inviting and proposing an exchange of lands.* By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. *Acceptance of such a proposal and compliance with its terms confer a vested right in the selected lands* which the land officers cannot lawfully cancel or disregard. *In this respect the provision under which the State proceeds does not differ from other land laws which offer a conveyance of title to those who accepted and fully comply with their terms.*" (Emphasis supplied)

The analogy to the case at hand is striking and a review of the Findings of Fact by the District Court show that title to

your Petitioners, LEWIS', land had been "accepted title", that *your Petitioners, LEWIS, had fully complied with all conditions imposed by law and regulations, and that the subsequent finding years later of "non-public interest" had no relationship to the time when the exchange was initiated or even to the time when the exchange was fully consummated on November* 4, 1959,b *the LEWIS' as to thir part of the exchange, bargain or swap.*

See also *Wyoming v. United States,* 255 U.S. 489 (1921).

These principals have been recognized by the Secretary, himself, in prior decisions of the Secretary of the Interior. In *State of Wisconsin,* 65 I.D. 265 (1958) the Secretary of the Interior said (pages 269, 270):

"When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, and thereafter the government holds legal in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal and no change in such conditions subsequently occurring, can impair or in any manner affect his rights . . .

"That the administration of the act in question falls within the jurisdiction of the land department there can be no doubt (*Bishop of Nesqually v. Gibbon,* 158 U.S., 155, 167). Selections under the act are therefore subject to examination by the officers of the land department until the issuance of patent. This examination is had for the *purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary requisites, has entitled himself to a patent, and not for the purpose of determining whether or not these*

officers will consent to the selection. If the examination whether had at the instance of third parties, claiming against the selections, or in *ex parte* proceedings, discloses that the selector has fully complied with all the necessary requisites and has honestly and correctly disclosed the title to the land relinquished and the condition and character of the land selected and that the records of the land department disclose no obstacle to the relinquishment of the selection, *the duty oft he land officers is clear; they must patent the land to the selector and they have no discretion to do otherwise. The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises and are not postponed to the time when that fact is ascertained and declared by the land officers.*

"These principles are in no sense antogonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. *Knight v. United States Land Association* (142 U.S. 161); *Michigan Land and Lumber Co. v. Rust* (168 U.S. 589); *Brown v. Hitchcock* (173 U.S. 473); *Hawley v. Diller* (178 U.S. 476). This jurisdiction extends to determining the question, whether or not the equitable title has passed; *but it has never been held that where such title has once actually vested the land department has the power to destroy it . . .*

"The land department has the jurisdiction and power, at any time before a patent is issued, to instiute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. *But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent. Kern Oil Company et al. v. Clark,* 30 L.D. 550, 556, 560, 565, (1901); on review, 31 L.D. 288 (1902)" (Emphasis supplied)

This view and determination of the Secretary of the Interior

as expressed at length in the preceding quotation from *State of Wisconsin*, 65 ID 265, , *agrees exactly with the words of the Supreme Court of the United States in Wyoming v. United States*, , 255 U.S. 489, page 501.

Lets look carefully at the legislation involved in private exchanged under the *Taylor Grazing Act* and see just exactly what discretion is in the Secretary.

Section 8(b) of *The Taylor Grazing Act* says:

"When public interest will be benefited thereby, the Secretary is authorized to accept (private lands) ..., and in exchange therefor to issue patent (to public lands)."

It does not say that the Secretary can determine the public interest before both accepting the private land and issuing patent to the public lands but only before accepting title to the private lands. *After such "acceptance" of title the patent will "issue".*

What the Secretary Udall, and the Courts Below, said and are saying is that such a determination *not only* can be made before accepting title to public lands, *but also can be made two or three years after acceptance of title* and before issuing patent to the selected lands to the private citizen. *Such an interpretation of the statute or regulation is an abuse of discretion and devoid of reason and defeats the Contressional will.*[1]

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1 To justify the Secretary in this abuse of discretion, the Court of Appeals Below cited two cases. *Neither case is analogous*:

Sallas v. Kirk, 200 F 2d 217, 220 (9th Cir. 1952), was a suit to enjoin a range manager from effecting a reduction in plaintiffs grazing of public lands under permit. The case involved "the administration" of the range lands as between grazing allottes. It involved regulations 43 CFR 161.15 and 161.4, the first of which authorizes special rules to fit local conditions and the second involves classification of land or water properties used for grazing. The suit was dismissed as the Court said: "*But assuming that action on appellants application for a permit is judicially reviewable*, we think the Secretary of the Interior is an indespensible party to the suit." (p. 220 (4, 5)).

Hall v. Hickel, 305 F. Supp 723 (D. Nev. 1969), was an action against the Secretary who refused to classify certain lands, selected and designated by plaintiff-applicant, as being suitable for disposition in satisfaction of land selection rights known as Valentine Scrip. The Court held

The interpretation, in effect makes the transaction no longer an exchange, but a "sale in reserve" so to speak.

Secretary Udall and the Courts Below would have us read the statute as if it were written as follows:

> "When public interest will be benefited thereby, the Secretary is authorized to accept (private lands) ... *and when the Secretary thereafter, at any time, finally decides it is again in the public interest to issue patent* to public lands to the selector, *he may in his discretion do so.*"

Such interpretation also ignores Section 8 (d) of The Taylor Grazing Act, (43 U.S.C. Section 315g (d)) which states how the exchange shall be *"effected"*:

"(d) Before any such exchange ... shall be effected,

The Secretary Udall and the Courts Below would have this clear and unambiguous section read as follows, by their interpretation of the regulations:

> "(d) Before (transfer of the public lands to the private individual) shall be effected (the Secretary must issue patent." *Such clearly is not the law.*

And *such an interpretation* of the regulation, 43 C.F.R. 146.3 (b) (1954 ed) *is wrong. It defeats the Congressional purpose under this exchange statute and it entrenches upon constitutionally protected freedoms.*

On the contrary, your Petitioners LEWIS contend, that the true purpose of such a regulation and the meaning of its words under this statute is the same meaning that those words have in other disposal statutes, that is, to give the Secretary the opportunity of ascertaining whether the applicant is acting within the law, in respect of both the land relinquished, and the land selected, and of approving or rejecting the selection accordingly. *The power conferred is judicial in nature.* It does not prevent the vesting of equitable title in the applicant *if it is not exer-*

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in the case that " . . . an incipient entryman *acquires no enforceable rights* in a particular tract selected by him *until that tract has been classified for particular kind of disposition proposed*".

cised in a proper and timely fashion, Payne v. New Mexico, supra.

The Secretary's conception of, and application of his authority, as upheld by the Courts Below, *can only survive if the exchange provisions* of The Taylor Grazing Act *are completely discretionary — in effect not what Congress says it is* an exchange of lands between a private citizen and his government.

Secretary Udall and the Courts Below are between Scylla and Charybdis. In the *Ferry v. Udall* case, supra, and *Lewis v. Udall,* 374 F2d 180 (C.A. 9, 1967), which were both cases dealing with public sales (auctions with reserve) under the Isolated Tracts Act, they argued that exchanges under The Taylor Grazing Act, and the like, were different from public sales under the Isolated Tracts Act (auctions with reserve), They argued that the rights which may accrue under other land disposal stautes did not apply to the Isolated Tracts Act which was a unique method of disposal.

Now, *when an exchange case arises* and Secretary Udall wished to treat, and did treat it exactly as an auction with reserve under the Isolated Tracts Act, *the Secretary argued and the Courts Below agree that there is no difference between the two insofar as the absolute discretion of the Secretary is concerned.*

Secretary Udall's new policies, promulgated by press release two years after *November* 4, 1959, initiated the new concept that there must be *"compelling reasons"* to consummate an exchange lawfully initiated. *Where does the statute provide for a "compeling reason test"?* Section 8 (b) of *The Taylor Grazing Act* merely provides for a "public interest".

Throughout this entire case the Government and the Courts Below have insisted that "There is no substantial difference between this (your Petitioners LEWIS' case), and *Ferry v. Udall* . . .; and *Lewis v. Udall* . . . (both of which were *public auction sales* cases).

HOWEVER, there is a difference. An exchange is a barter or

swap; while a public sale auction with reserve is an entirely different thing. *The Isolated Tracts Act,* (which provides *no* proceedure for the sale at auction), *is a unique law,* and *is not at all comparable to the exchange Sections b and d of The Taylor Grazing Act, which provides how the exchange shall be effected,* the proceedure for so doing *and says that patent will issue for the public land selected upon acceptance of the private citizens* title to his base lands.

This is not even to mention the explicit directions of the Secretary's own regulations as to when the exchange is completed:

"Section 146.8 — Approval of Exchange; Rules of Practice to be followed.

(a) The proof of publication, conveyance, title evidence and other evidence furnished by the applicant will be examined, and if found satisfactory and no valid objection appearing to the consummation of the exchange, *title to the offered land will be accepted and patent for the selected land will* issue,". (Emphasis supplied) 43 C.F.R. Sec. 146.8

The Government and the Courts Below sanctioned a regulation under the Isolated Tracts Act which provided that no rights vest until the issuance of a *cash certificate. However, no cash certificate issues in an exchange. Why? Because as the normal law of exchanges provides, the condition of transfer by the government is concurrent with the completion of the conveyance and the acts under the statute performed by the private citizen.* (Restatement of Contracts, Section 267; Selections from Willis ton on Contracts, revised edition, Section 835, p. 717)

If Congress had intended differently they would have expressly said so, as they did in the Act of Feburary 7, 1929, 45 Stat. 1154, supra. See *Red Canyon Sheep Co. vs. Ickes,* supra.

Again, and again the Government and the Courts Below return to the Isolated Tracts Act decisions under *Ferry v. Udall,* supra, and *Lewis v. Udall,* supra, *cases which deal with public sales auctions with reserve,* and which were *not* exchanges. In so doing they argue:

"There is obviously no compelling reason why one who offers to exchange property — any more than one who bids at public auction as in *Ferry* and *Lewis* — should acquire an interest in the public lands involved, particularly when in both instances the relevent regulations (not the statutes) caution that no rights will accrue."

However, there are a number of compelling reasons why such rights should accrue in the case of an exchange. These reasons are.

1. *The statutory language of Sections* 8(b) *and* (d) of The Taylor Grazing Act are not without directives as to how the exchange shall be *"effected"*. This language has been discussed extensively previously herein.

2. *The general law of exchanges* which is a barter or a swap is entirely different from a public sale auction with reserve dealt with in the *Ferry* and *Lewis* cases, supra.

3. *The regulations require it.* 43 C.F.R. Sec. 146.8, in effect at that time, entitled, "Approval of exchange; Rules of Practice to be Followed.", was quire explicit as to when the exchange was consummated and in the directing when patent will issue. *All of the acts required for issuance of patent under that regulation had been performed by your Petitioners by November* 4, 1959,

In regard to the issue of *res judicata* under the facts of this case insofar as the March 20, 1959 decision is concerned finding that the LEWIS exchange was in the public interest, *counsel respectfully refers the Court to the Secretary's own regulations CFR* § 221.10 *now CFR* § 1844.1) which reads as follows:

"Section 221.10 Effect of Failure to Appeal

"When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."

And also to 43 CFR § 221.31, which reads as follows:

"No appeal, however, may be taken from the decision of the Director affirming a decision of a subordinate official of the

Bureau in any case where the party adversely affected shall have failed to appeal the decision of such official." (Emphasis supplied)

Certainly, the conduct of the Secretary in culminating the lengthy delay of this matter by refusing to convey its lands after accepting title to the applicants' land based upon press release policy reasons and not even upon regulation or statute, *is grossly irregular, inequitable and contrary to the law of exchanges.*

VII. CONCLUSION

THEREFORE, it is the prayer of your Petitioners, that the Supreme Court of the United States grant this Petition for a Writ of Certiorari and hear this case, to the end that:

1. A decision will be forthcoming which will secure and promote uniformity of decision as to the land use and land disposal laws of these United States, protect the Congressional power and purpose under its statutes, and prevent the entrenchment upon constitutionally protected freedoms, and

2. Further that the said decision will direct the Secretary of the Interior to issue patent to your Petitioners for the 160 acres of lands previously selected in the exchange bargain or swap which your Petitioners completed November 4, 1959, eleven (11) years ago.

Respectfully submitted,

John J. Lewis

VIII. APPENDIX

EXHIBIT 1

IN THE
UNITED STATES DISTRICT OURT
FOR THE DISTRICT OF ARIZONA

PERLEY M. LEWIS and MILDRED C. LEWIS his wife, *Plaintiffs,* vs. STEWART L. UDALL, Secretary of the Interior, et al., *Defendants.*	No. Civ-5003 Phx.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This is an action seeking judicial review of a final decision of the Secretary of the Interior, acting through the Assistant Secretary of the Interior, dated June 27, 1963, rejecting a proposed exchange of land tendered under the provision of Section 8(b) of the Taylor Grazing Act, as amended, 43 U.S.C. (1958 ed.) Sec. 315g(b). This section of the Taylor Grazing Act provided as follows:

> When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

Regulations of the Department of the Interior relating to such exchanges provide, in part, as follows (43 C.F.R. 146.3(b)):

> * * * until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States other than an obligation to pay one-half the cost of publication.

The matter came on for hearing before the Court June 26, 1967, upon the motion of plaintiffs for summary judgment, and upon the motion of defendants for summary judgment, pursuant to Rule 56, Rules fo Civil Procedure. The motions were supported by exhibits and memoranda from both parties. The matter was argued to the Court, and additional memoranda submitted. Thereafter, on July 31, 1967, this Court entered its order granting the motion for summary judgment on behalf of the defendants and denied the motion for summary judgment on behalf of plaintiffs. Subsequently plaintiffs filed a motion for reconsideration of the order and judgment of July 31, 1967. The matter was argued to the Court, and additional memornda submitted. The motion to reconsider, having been taken under advisement, and both parties having submitted proposed findings of fact and conclusions of law, the Court finds as follows:

FINDINGS OF FACT

1. On June 6, 1956, plaintiffs filed a private exchange application, Arizona 016558, in the Phoenix Land Office, Bureau of Land Management, seeking to exchange the south half of Section 31, and the south half of the southwest quarter of Section 33, Township 16½ North, Range 20 West, Gila and Salt River Base and Meridian, Mohave County, Arizona, (approximately 388.73 acres), for 160 acres of federally owned land which is the south half of the southwest quarter of Section 4, and the north half of the northwest quarter of Section 9, Township 3 South, Range 7 East, Gila and Salt River Base and Meridian, Pinal County, Arizona.

2. On November 1, 1957, a field report was submitted by the

Government Evaluation Engineer upon the base lands and the selected lands recommending the approval of the exchange.

3. On January 17, 1958, Warren D. Brough, the acting Range Manager in charge of Arizona District 2-3, requested that additional consideration be given the grazing capacity rating of the land.

4. On March 20, 1958, another report was given by Eugene H. Newell, Lands and Minerals Officer, which report was approved, and the lands were classified as suitable for exchange under Arizona 016558, and said exchange was held to be in the public interest.

5. The Federal Grazing Lessee upon the selected lands, Vantex Land & Development Company, was notified of the classification of suitability for exchange March 21, 1958, and given thirty 30 days to protest the classification of the selected government lands.

6. On April 22, 1958, Vantex filed its protest. One day prior to filing this protest, on April 21, 1958, Vantex also filed a large over-riding private exchange of its own, involving 960 acres, numbered AR-018390. The lands applied for in the Vantex application over-rode the 160 acres applied for by the plaintiffs herein.

7. On May 1, 1958, the Phoenix Land Office rejected that portion of the Vantex exchange which conflicted with the plaintiffs' exchange. On June 3, 1958, Vantex appealed this rejection.

8. On June 11, 1958, the State Supervisor for Arizona sent a memorandum to the Director dealing with the conflict in exchanges and stating that the State Supervisor believed that there was no reason to change the Manager's decision rejecting that portion of the Vantex application which conflicted with the plaintiffs' application.

9. On June 24, 1958, the State Supervisor dismissed the Vantex protest of April 22, 1958, and on July 25, 1958, Vantex appealed from this dismissal.

10. Approximately one year later on March 20, 1959, the Director of the Bureau of Land Management, Washington, D. C. issued his decision which decided the two appeals above referred to, and the over-riding application of Vantex. (The Director's decision also contained a decision concerning Arizona 018397, which was an application by Kelly Investment Company, for a patent to eighty (80) acres for a mining claim. Said mining claim application had also been blanketed by the over-riding Vantex exchange application.) In the decision of March 20, 1959, the Director recognized that the plaintiffs' exchange was in the public interest, but raised the question from the Government's standpoint that perhaps the Vantex exchange might also be in the public interest, and requested that both exchanges be remanded for determination of which exchange was more in the public interest and stated in his decision:

> "After such determination has been made, simultaneously, publication of the successful application will be ordered, and the unsuccessful application rejected to the extent of the conflict. The dismissal of Vantex's protest against the disposal of the land in conflict between its and Lewis' application is affirmed. The decision of October 31, 1958, is affirmed and modified."

This decision of the Director was not appealed by Vantex, and the Director, after the appeal period had run, returned the case to the Land Office Manager through the State Supervisor of the Bureau at Phoenix, Arizona, for further action indicated in the decision.

11. On September 23, 1959, pursuant to the decision of the Director, the Manager of the Phoenix Land Office decided that plaintiffs' application for exchange:

> "would be more in th epublic interest, that the offered and the selected lands are approximateely of equal value and publication is directed thereon."

12. Plaintiffs were given sixty (60) days to comply and proceeded at once to comply with the Manager's order, and plain-

tiffs' Warranty Deed dated September 25, 1959, was recorded on October 1, 1959, in Book of Deeds 100, at Page 104-5, official records of Mohave County, Arizona, and said deed was transmitted on October 10, 1959, to the Land Office in Phoenix, together with tax receipts showing taxes paid by plaintiffs for 1959 on the subject lands.

On October 14, 1959, plaintiffs filed a policy of title insurance with the Land Office.

On November 4, 1959, plaintiffs filed in the Land Office both the Mohave County Miner and the Florence Blade-Tribune proofs of publication, together with papers showing that plaintiffs had, in each case, paid one-half of the publication charges, thus completing conveyance of their base lands to the United States of America.

13. Both parties agree that as of November 4, 1959, plaintiffs had done everything necessary under the Director's decision of March 20, 1959, and had conveyed their lands to the United States.

14. Vantex had made no appeal from the Director's decision of March 20, 1959. Nevertheless, on October 23, 1959, Vantex appealed for the second time to the Director from the decision of the Manager of September 23, 1959, which decision found that the plaintiffs' exchange was the one which was more in the public interest.

Plaintiffs and other interested parties moved for a summary dismissal of the Vantex appeal for the reason that the matter had already been adjudged by the Director's decision of March 20, 1959, and that since Vantex failed to appeal said decision, Vantex had no right to make an appeal for the second time to the Director.

15. On February 14, 1961, the new Secretary of the Interior announced new policies which were not published in the Federal Register. In this announcement the Secretary said:

"The Department will no longer continue to try to force pre-

sent-day land needs into the unworkable straight jacket of outdated laws."

16. The Director withheld his decision for some seventeen (17) months thereafter, and on March 20, 1961, the Director issued his decision on the Vantex appeal of October 23, 1959. In this decision, the new Director recited again that plaintiffs' exchange had been determined to be more in the public interest than the Vantex Exchange. The decision states:

"Neither of the applicants have submitted any positive and substantial evidence that consummation of the proposed exchanges would be in the public interest or would help to facilitate the management of public lands."

The Director further noted:

"It is the present policy of the Department that private exchanges will not be entertained or consummated except where it is shown that there are compelling reasons to acquire the offered lands to augment long range Federal Resource Management programs, and no such compelling reasons to acquire the offered land is indicated in the instant cases."

The Director then,

"remanded (the case records) to the State Supervisor for Arizona in order that the prior proposed exchange (the Lewis exchange) . . . may be reviewed in the light of the present policies of the Department."

17. On November 15, 1961, the Acting Manager of the Phoenix Land Office issued a decision and in said decision stated:

"There is no compelling reason to acquire the offered lands to augment any long range Federal Resource Management program, and consummation of the exchange is not in the public interest."

18. On December 22, 1961, plaintiffs appealed to the Director from the Phoenix Land Office decision dated November 15, 1961.

19. After extension of time for good cause, plaintiffs appealed to the Secretary on April 17, 1962. The decision of the Director

of February 21, 1962, was affirmed by letter decision of June 27, 1963. That decision stated:

> "I find that there are no compelling reasons to justify acquiring the 388.73 acres offered in your proposed exchange, notwithstanding the fact that you have conveyed title to the United States; nor is there any substantial or positive evidence that the consummation of the exchange would otherwise benefit the public interest."

20. On July 12, 1963, plaintiffs' attorney requested reconsideration of the Secretary's decision. On August 9, 1963, said request was denied by the Assistant Secretary.

21. The lands offered by plaintiffs were not offered for exchange by mistake; the lands approved for exchange by the defendants were not approved for exchange by mistake; there was no fraud involved in the holding of said exchange on the part of either the defendants or their agents, or by the plaintiffs, or by any other party or person interested in the exchange.

22. Plaintiffs have not had control of the property which they deeded to the United States for a period exceeding eight (8) years pending completion of administrative proceedings, and this litigation. Although subsequent to final rejection by the Department of the Interior, the United States tendered a Quit Claim Deed designed to reconvey the property to plaintiffs in compliance with §6 of the Act of April 28, 1930, 46 Stat. 257, 43 U.S.C §872.

CONCLUSIONS OF LAW

1. The Secretary of the Interior may exercise his discretion in approving or rejecting an application for the exchange of lands.

2. The Secretary of the Interior in the instant case exercised his discretion as provided by law, in first approving the proposed exchange. What remained to consummate the exchange were ministerial acts.

3. Prior to the execution of the ministerial acts, the Secretary changed the policies of the Department, and thereafter reversed

his prior discretionary action and rejected the exchange. There appears to be no rule of law or regulation of the Department in deterrence of such action.

4. Defendants are entitled to summary judgment dismissing the action in accord with its petition, and as stated by this Court in its order of July 31, 1967.

DATED at Phoenix, Arizona this 28th day of May, 1968.

WALTER E. CRAIG
United States District Judge

A TRUE COPY.
Certified this 23 day of September, 1970.

W. J. Furstenau, Clerk
By LARRY EFCHICHY
Deputy Clerk
(SEAL)

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERLEY M. LEWIS and MILDRED C. LEWIS, his wife Plaintiffs, vs. STEWART L. UDALL, Secretary of the Interior, et al., Defendants.	No. Civ-5003 Phx. AMENDED JUDGMENT

This matter having come on for hearing on defendants' motion for summary judgment and plaintiffs' cross motion for summary judgment, and plaintiffs' motion for reconsideration of judgment entered herein on the 31st day of July, 1967, and the Court having considered the pleadings, the exhibits and memoranda in support of both motions, and while it appears that the result is unnecessarily harsh in that the plaintiffs found themselves in a position where the Secretary of the Interior had, by decision, approved the proposed exchange, and prior to its ultimate consummation had changed the policy of the Department, and thereafter rejected the proposed exchange; nevertheless, it appears that the Secretary has such discretionary authority.

IT IS ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment is granted.

2. That plaintiffs' motion for summary judgment is denied.

3. That plaintiffs take nothing, and the action be dismissed on the merits.

DATED at Phoenix, Arizona this 28th day of May, 1968.

WALTER E. CRAIG
United States District Judge.

A TRUE COPY..
Certified this 23 day of September, 1970.

W. J. Furstenau, Clerk.
By LARRY ETCHERLY
Deputy Clerk

(SEAL)

Copies mailed to:

United States Attorney
John D. Lewis, Esquire

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23,086

PERLEY M. LEWIS and Mildred C. LEWIS, his wife,

Plaintiffs — Appellants,

v.

WALTER J. HICKEL, as Secretary of the United States Department of the Interior

CHARLES H. STODDARD, as Director of the Bureau of Land Management, United States Department of the Interior; FRED J. WEILER, AS Arizona State Director of the Bureau of Land Management, United States Department of the Interior; ROY T. HELMANDOLLAR, as Manger, Phoenix Land Office, Bureau of Land Management, United States Department of the Interior,

Defendants.

Appeal from the United States District Court for the District of Arizona.

Argued: March 12, 1970

Decided: June 1, 1970

Before: BARNES, HAMLEY and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

Appellants brought suit to overturn a decision of the Secretary of the Interior rejecting their application for a private exchange of lands under the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended, 43 U.S.C. § 315 et. seq. (1964). Summary judgment was granted for the Secretary and this appeal followed. We affirm.

The Taylor Grazing Act gives the Secretary power to create and administer grazing districts on the public lands ". . . to preserve the land and its resources from destruction or unnecessary injury, and to provide for the orderly use, improvement and development of the range." *Sellas v. Kirk*, 200 F.2d 217, 218 (9th Cir. 1952). Among the powers granted to the Secretary is the power to protect and rehabilitate land within the grazing districts (43 U.S.C. § 315a), the power to issue grazing permits (43 U.S.C. § 315b), the power to classify land as more suitable for non-grazing uses (43 U.S.C. § 315f), and the power to exchange private or state-owned lands for federally-owned lands. 43 U.S.C. § 315g (c-d). Section 2 of the Act, 43 U.S.C. § 315a, gives the Secretary authority to issue rules and regulations "to accomplish the purposes of this chapter . . ."

The case now before us concerns the private exchange provisions of the Act, which are set forth in the margin.1. A summary of the administrative history will point up the issues on this appeal.

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1 "When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands." Sec. 8(b) of Act, as amended, 43 U.S.C. 315g(d) (1964)

"Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located . . . No fee shall be charged for any exchange of land made under this chapter except one-half of the cost of publishing notice of a proposed exchange as herein provided." Sec. 8 of Act, as amended, 43 U.S.C. 315g(d) (1964).

On June 6, 1956, appellants filed a private exchange application in the Phoenix Land Office, offering to exchange 389 acres of land owned by appellants ("base lands") for 160 acres of federally-owned lands within a grazing district ("selected lands"). The Land Office found the exchange to be in the "public interest," but upon appeal by Vantex Land and Development Co. (Vantex), a grazing lessee on the selected lands who had filed an over-riding exchange application, the Director of the Bureau of Land Management remanded the case to the Land Office for a determination as to which of the two exchanges "is more in the public interest."

Following remand, no appeal having been taken from the Director's decision, the Land Office on September 23, 1959, entered a decision finding appellants' exchange to be in the "public interest" and rejecting the Vantex exchange. By November 4, 1959, appellants had completed all steps required by Section 8 (d) of the Act and the regulations (43 C.F.R. § 146.4-6 (1954 rev.)),2. including submission of a deed to the base lands in favor of the United States.

On October 23, 1959, Vantex filed an appeal to the Director from the Land Office decision of September 23. Although appellants moved to dismiss the appeal, no decision was forthcoming until March 20, 1961. At that time the Director denied the motion to dismiss and once again remanded the case to the Land Office to determine the efficacy of the exchange under a more stringent "public interest" test which had been adopted in the interim.3. Upon remand the exchange was found lacking under the new standards, and this finding was affirmed by the Director and Secretary. This legal action followed.

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2 Minor changes in the regulations were made in 1968 and now appeare at 43 C.F.R ⎪ 2244 (1969).

3 On February 14, 1961, the Secretary issued a press release stating, in part:

"Private exchanges will not be entertained or consummated except where it is shown that there are compelling reasons to acquire the offered lands to augment long-range Federal resource management programs."

We first dispose of appellants' contention that the second appeal by Vantex should have been dismissed for failure to appeal from the Director's first decision. While the Director found the exchange to be in the public interest on the first appeal, and no appeal from that finding was taken to the Secretary, this does not mean that the finding became "final" or the "law of the case." Vantex's choice to return to the Land Office instead of appealing to the Secretary, could not preclude the Secretary from reviewing all the findings following the remand. Closely analogous is the rule that a Court of Appeals remand does not preclude the Supreme Court from reviewing all previous rulings on an appeal following a remand. *See Hamilton-Brown Shoe Co. v. Wolf Brothers Co.*, 240 U.S. 251, 257-59 (1917). 6 J. Moore, Federal Practice § 54.08(2) (1966).

The second issue raised is whether appellants are entitled to compel issuance of the patent on the selected lands because they complied with all the necessary conditions regarding transfer of the base lands to the United States.

Stripped of all surplusage, *appellants'* argument *questions the validity of C.F.R. § 146.3(b) (2) 1954 rev.)* 4 which provides that the authorized officer may at any time prior to issuance of a patent on the selected lands determine that the exchange should not be completed. The regulation also states that the applicants shall have no contractual or other rights against the United States prior to receiving the patent. Appellants contend that the regulation is contrary to the procedure outlined by Congress in Section 8 of the Act (see footnote 1, *supra,*), and "the general law applicable to exchanges."

Our review of the Act, read as a whole, leads us to conclude that Contress intended nothing more than to grant the Secretary power to enter into exchanges, subject to the "public interest" requirement and the applicable notice provisions to protect interested third persons. As between the applicant and the Secretary,

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4 Now substantially repeated in 43 C.F.R. § 2244.1-4 (1969).

the Act does not circumscribe the manner in which the exchange is to be consummated. This lack of direction implies that the terms and conditions upon which exchange proposals may be made fall within the Secretary's general rule-making power, *provided the regulation does not defeat the congressional purpose or entrench upon constitutionally protected freedoms. Compare Gutknecht v. United States, U.S. ; Greene v. McElroy,* 360 U.S. 474 (1959). We can find no such problems here. *See Ferry v. Udall,* 336 F.2d 706, 714 :9th Cir. 1964).

Our conclusion that the Secretary has power to reject applications prior to issuance of the patents finds support in Section 6 of the Act of April 28, 1930, as amended, 43 U.S.C. § 872 (1964). That section gives the Secretary authority to return base land deeded to the United States in an exchange transaction when the exchange is "thereafter withdrawn or rejected." Hence, no rights could accrue to either side to the exchange before issuance of the patent on the selected lands. 5

Appellants place strong reliance upon *Payne v. New Mexico,* 255 U.S. 367 (1921), a case involving the Secretary's denial of an exchange under an Act granting New Mexico the *right* to select certain lands for the support of common schools. However, that case and others like it 6 are inapposite since they arose under statutes granting interests in lands once certain conditions has been complied with. Hence, the power conferred upon the Secretary was merely "judicial in its nature" (255 U.S. at 371) in the sense that his only function was to ascertain whether the specified conditions had been met.7

5 Appellants argue that this section is inapplicable to private exchanges under the Taylor Grazing Act. However, the Act of April 28, 1930, was a general grant of power to the Secretary and we can see no reason why Congress was required to re-enact this provision four years later in the Taylor Grazing Act.

6 *Wyoming v. United States,* 255 U.S. 489 (1921); *Benson Mining & Smelting Co. v. Alta Mining* N *Smelting Co.,* 145 U.S. 428 (1892).

7 In *Wyoming v. United States,* 255 U.S. 489-496 (1921), the Court stated:

Under the exchange provisions of the Taylor Grazing Act, the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. In addition, he must determine that "public interests will be benefited" by the exchange. Until this determination is finally resolved and the patent issued, the exchange application is nothing more than a proposal under which no contract rights arose and no equitable title vested.

This result is identical in principle with cases involving a cash deposit pending issuance of a cash certificate under the Isolated Tracts Act, Rev. Stat. § 2455, as amended, 43 U.S.C. § 1171 et. seq. (1964). *Lewis v. Udall,* 374 F.2d 180 (9th Cir. 1967); *Ferry v. Udall,* 366 F.2d 706 (9th Cir. 1964); *Willcoxson v. United States,* 313 F.2d 884 (D.C. Cir. 1963).

Having decided that the Secretary had authority ultimately to reject appellants' application, we then turn to their contention that it was an abuse of discretion to do so. However, for the reasons given in *Ferry v. Udall, supra,* and *Sellas v. Kirk,* 200 F.2d 217, 200 (9th Cir. 1952), we conclude that the determination of "public interest" is one "by law committed to agency discretion" and therefore unreviewable. Administrative Procedure Act § 10, 5 U.S.C. § 009 (1964). *See* also *Hall v. Hickel,* 305 F. Supp. 723 (D. Nev. 1969).

Affirmed.

"The power confided (to the Secretary) was not that of granting or denying a privilege..., but of determining whether an existing privilege conferred by Congress had been lawfully exercised."

EXHIBIT 4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970

No. ————

PERLEY M. LEWIS and MILDRED C. LEWIS, his wife,
Petitioners,

vs.

WALTER J. HICKEL, as Secretary
of the Interior, et al,
Respondents.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby extended to and including September 30, 1970

|s| WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated 3 day of
September, 1970

EXHIBIT 5

The *CONSTITUTION* OF THE UNITED STATES OF AMERICA

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or inditement of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for publis use, without just compensa*tion." (Emphasis supplied)

EXHIBIT 6

"The Taylor Grazing Act of June 28, 1934, with amendments to May 1, 1967, is the basic legislative authority governing the management and protection of the facant public lands of the United States. Because of the broad powers it confers upon the Department of the Interior for multiple-use management of natural resources, it is one of the major conservation laws of the Nation. Without departing from the original primary objectives and conservation policies, the Congress has from time to time amended the Act to keep it abreast with changing demands. BUREAU OF LAND MANAGEMENT."

THE TAYLOR GRAZING ACT
AS AMENDED AND SUPPLEMENTED

An Act

To stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes.

Approved June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976), July 14, 1939 (53 Stat. 1002), July 30, 1947 (61 Stat. 630), August 6, 1947 (61 Stat. 790), June 19, 1948 (62 Stat. 533), and May 28, 1954 (68 Stat. 151).

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMEICA IN CONGRESS ASSEMBLED, That in order to promote the highest use of public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additons thereto and..or to modfy the boundaries thereof of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: PROVIDED, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter nitiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect

any land heretofore or hereafter surveyed which, except for the provision of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stockgrazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act," shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U.S.C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U.S.C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: PROVIDED, HOWEVER, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districtsi from all forms of entry or settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to

interfere with hunting or fishing within a grazing district. (43 U.S.C., sec. 315)

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500. (43 U.S.C., sec. 315a)

SEC. 3. The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvement. Grazing per-

mits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: PROVIDED FURTHER, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands. (43 U.S.C., sec. 315b)

Sec. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be sisued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. (43 U.S.C., sec. 315c)

SEC. 5. The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act. (43 U.S.C., sec. 315d)

SEC. 6. Nothing herein contained shall restrict the acquisition, granting, or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and

nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. (43 U.S.C., sec. 315e)

SEC. 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands, withdrawn or reserved by Executive Order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive Order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: PROVIDED, That locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: PROVIDED, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such

lands if opened to entry as herein provided. (43 U.S.C., sec. 315f)

SEC. 8. (a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.

(b) When public interest will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue a patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: PROVIDED, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such section.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: PROVIDED, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved

mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one-half of the cost of publishing notice of a proposed exchange as herein provided. (43 U.S.C., sec. 315g)

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wildlife interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of lands within or without the exterior boundaries of a grazing district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost. (43 U.S.C., sec. 315h)

SEC. 10. Except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but the following proportions of the moneys so received shall be distributed as follows: (a) 12-1..2 per centum of the moneys collected as grazing fees under section 3 of this Act during any fiscal year shall be paid at the end thereof by the Secre-

ury of the Treasury to the State in which the grazing districts producing such moneys are situated, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts producing such moneys are situated: PROVIDED, That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area in said district; (b) 25 per centum of all moneys collected under section 15 of this Act during any fiscal year when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements; and 50 per centum of all moneys collected under section 15 of this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the lands producing such moneys are located, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the lands producing such moneys are located: PROVIDED, That if any leased tract is in more than one State or county, the distributive share to each from the proceeds of said leased tract shall be proportional to its area in said leased tract. (43 U.S.C., sec. 315i)

SEC. 11. That when appropriated by Congress, 33-1..3 per centu mof all grazing fees received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 66-2..3 per centum of all grazing fees received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public-land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every applica-

tion for non-mineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application. (43 U.S.C., sec. 315j)

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly where the same stock graze part time in a grazing district and part time in a national forest or other reservation. (43 U.S.C., sec. 315k)

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be created or enlarged by Executive Order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion can best be administered under the provisions of this Act: PROVIDED, That such reservations or transfers shall not interfere with legal rights, acquired under any public-land laws so long as such rights are legally maintained. Lands placed under the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in

the Executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933. (43 U.S.C., sec. 315 l)

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U.S.C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: PROVIDED, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: PROVIDED FURTHER, that any legal subdivisions of the public land, not exceeding seven hundred and sixty acres, the greater part of which is mountainous or too rought for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands ajoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: PROVIDED FURTHER, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word 'person' in this section

shall be deemed to include corporations, partnerships, and associations." (43 U.S.C., sec. 1171)

SEC. 15. The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: PROVIDED, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary: PROVIDED FURTHER, That when public lands are restored from a withdrawal, the Secretary may grant an appropriate preference right for a grazing lease, license, or permit to users of the land for grazing purposes under authority of the agency which had jurisdiction over the lands immediately prior to the time of their restoration. (43 U.S.C., sec. 315m.)

SEC. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: PROVIDED, HOWEVER, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States. (43 U.S.C., sec. 315n)

SEC. 17. Superseded by 1946 Reorganization Plan No. 3 ,sec. 403, effective July 16, 1946 (11 F.R. 7876, 60 Stat. 1100). (43 U.S.C., sec. 315o)

SEC. 18. (a) In order that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district, the members of which shall be known as grazing district advisers. Each such board shall consist of not less than five nor more than twelve members, exclusive of wildlife representatives, one such representative to be appointed by the Secretary, in his discretion, to membership on each suchh board. Except for such wildlife representatives, the names of the members of each district advisory board shall be recommended to the Secretary by the users of the range in that district through an election conducted under rules and regulations prescribed by the Secretary. No grazing district adviser so recommended, however, shall assume office until he has been appointed by the Secretary and has taken an oath of office. The Secretary may, after due notice, remove any grazing district adviser from office if in his opinion such removal would be for the good of the service.

(b) Each district advisory board shall meet at least once annually at a time to be fixed by the Secretary of the Interior, or by such other officer to whom the Secretary may delegate the function of issuing grazing permits, and at such other times as its members may be called by such officer. Each board shall offer advice and make recommendation on each application for such a grazing permit within its district: PROVIDED, That in no case shall any grazing district adviser participate in any advice or recommendation concerning a permit, or an application therefor, in which he is directly or indirectly interested. Each board shall further offer advice or make recommendations concerning rules and regulations for the administration of this Act,

the establishment of grazing districts and the modification of the boundaries thereof, the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this Act within the district. Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district. (43 U.S.C., sec. 315o-1)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 779

PERLEY M. LEWIS AND MILDRED C. LEWIS, PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Secretary of the Interior's opinion (App. A, *infra*, pp. 7–8) is not reported. The district court's findings of fact and conclusions of law (Pet. Ex. 1, pp. 26–33) are not reported. The opinion of the court of appeals (Pet. Ex. 3, pp. 36–41) is reported at 427 F.2d 673.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari through

406-537—70

September 30, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had authority to reject petitioners' proposed exchange of privately owned lands for public lands under the Taylor Grazing Act once the deed for petitioners' lands had been tendered.

STATUTES AND REGULATION INVOLVED

The statutes and regulation involved [1] are set forth in Appendix B, *infra*, pp. 9–10.

STATEMENT

This is a suit to review a decision of the Secretary of Interior rejecting a proposed exchange of lands. Petitioners applied to the Secretary to exchange certain lands they owned for federal lands under Section 8(b) of the Taylor Grazing Act, 43 U.S.C. 315g(b). Such exchanges are authorized "When public interests will be benefited * * *." Applicable regulations provide that a proposed exchange may be rejected at any time prior to issuance of a patent, or title, to the land, and that actions taken in connection with the proposal up to that point create no contractual rights and convey no title. Petitioners completed all acts required

[1] Section 8(b) of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. 315g(b); Section 6 of the Act of April 28, 1930, 46 Stat. 257, as amended, 43 U.S.C. 872; 43 C.F.R. (1954 rev.) 146.3(b).

of them to qualify for the proposed exchange, including conveyance of their land to the United States. The local Land Office found that the proposed exchange was in the "public interest," but appeals by another applicant for the same public lands and resulting administrative proceedings delayed processing of the proposal for some time. During this period, in 1961, the Secretary adopted a policy limiting exchanges to cases in which "compelling reasons" could be shown for acquiring the proffered lands. After a second remand to the Land Office, petitioners' proposed exchange was rejected under the new test. The Director and the Secretary affirmed that rejection, and the United States tendered to petitioners a quitclaim deed for the land which they had conveyed to it.

On cross-motions for summary judgment, the district court held the Secretary's action to be within his authority and discretion. The court of appeals affirmed, concluding that "the determination of 'public interest' is one 'by law committed to agency discretion' and therefore unreviewable" under the Administrative Procedure Act, 5 U.S.C. (Supp. V) 701–706.

ARGUMENT

1. The regulation involved, 43 C.F.R. (1954 rev.) 146.3(b),[2] expressly provided that "until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or

[2] The regulation is now substantially repeated in 43 C.F.R. 2244.1–4(a).

other rights against the United States * * *." There can be no serious question that this regulation was valid and binding on petitioners. Nothing in the Act suggests that such a precautionary regulation is beyond the discretionary authority granted the Secretary. Quite to the contrary, the Act merely authorizes and does not direct the Secretary to effect exchange. As the court of appeals observed (Pet. Ex. 3, p. 40), "[T]he Act does not circumscribe the manner in which the exchange is to be consummated" and "This lack of direction implies that the terms and conditions * * * fall within the Secretary's general rule-making power * * *." Indeed, Section 2 of the Act, 43 U.S.C. 315a, expressly directs the Secretary to issue rules and regulations to accomplish its purposes. It follows that neither the government's acceptance of petitioners' tender of their lands nor the subsequent administrative proceedings vested in petitioners any rights to public lands; the Secretary had full authority to reject their proposed exchange of lands up until the moment when a patent "is issued." (43 C.F.R. (1954 rev.) 146.3(b), *supra*).

This conclusion is buttressed by the authority given the Secretary—and exercised in this case—to return land deeded to the United States in connection with an exchange application when the proposal is "thereafter withdrawn or rejected * * *." Section 6, Act of April 28, 1930, 43 U.S.C. 872. Moreover, the policy of the statute and the regulation was fairly applied in this case. Petitioners' proposed exchange was rejected because there were no "compelling reasons to acquire the offered lands to augment long-range Federal Resource Man-

agement programs" and petitioners did not show "that the consummation of the exchange would otherwise benefit the public interest" (Pet. Ex. 1, pp. 31, 32). Benefit to the public interest was the statutory criterion before as well as after the [illegible] policy statement.

2. There is no conflict with any decision of this Court or of the courts of appeals. The court of appeals properly distinguished cases such as *Payne* v. *New Mexico*, 255 U.S. 367. Those cases arose under statutes *requiring* disposal of public lands when specified conditions had been met; in effect, Congress exercised the power to dispose of public property and conferred no discretion on the Secretary to refuse to exchange lands. While the Secretary was given discretion to determine which public lands should be exchanged, the statute conferred a clear right to some exchange. In this context, the Court held that a proposed exchange, once accepted, could not subsequently be undone by a refusal to patent the government lands. But here there was never an obligation to exchange, and so the Secretary remained free to reject the proposal. See *Ferry* v. *Udall*, 336 F.2d 706, 711–714 (C.A. 9), certiorari denied, 381 U.S. 904; *Willcoxson* v. *United States*, 313 F.2d 884, 887–888 (C.A. D.C.), certiorari denied, 373 U.S. 932.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALTER KIECHEL, JR.,
Acting Assistant Attorney General.
EDMUND B. CLARK,
RAYMOND N. ZAGONE,
Attorneys.

NOVEMBER 1970.

APPENDIX A

United States Department of the Interior, Office of the Secretary, Washington 25, D.C.

A–29572
Private Exchange
Arizona 016558

JUNE 27, 1963.

DEAR MR. LEWIS: I have considered your letter of April 17, 1962, wherein you have appealed to the Secretary of the Interior from a decision dated February 21, 1962, by which the Director, Bureau of Land Management, affirmed a decision of the Land Office at Phoenix, Arizona, rejecting your private exchange application (Arizona 016558), because there were no compelling reasons to acquire the offered lands to augment long-range Federal resource management programs and the exchange would not, therefore, be in the public interest.

You contend on appeal, among other things, that (1) you have complied with all requirements, including the conveyance in October 1959, of the offered land to the United States by warranty deed, to complete the exchange, and have earned and are entitled to a final certificate to the selected land, and (2) you would have no quarrel with the Bureau of Land Management had it, in 1959, or at any time during the ensuing two and one half years, decided to refuse to issue cash certificate and patent to the selected land, on the ground that the government had need of, and a use for, the said selected land, or that disposal thereof would injure the government.

Section 8(b) of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(b)), authorizes the Secretary of the Interior to accept privately-owned land in exchange for not to exceed an equal value of public land when public interests will be benefited thereby. The determination as to whether the public interest will be benefited is a matter committed wholly to the discretion of the Secretary.

After full consideration of your reasons for appeal and upon careful review of the record, I find that there are no compelling reasons to justify acquiring the 388.73 acres offered in your proposed exchange, notwithstanding the fact that you have conveyed title thereto to the United States; nor is there any substantial or positive evidence that the consummation of the exchange would otherwise benefit the public interest.

I conclude that the rejection of your exchange application was consistent with the facts and was entirely proper.

Therefore, the decision appealed from is affirmed.

The case is remanded to the Director, Bureau of Land Management, who will, in due course, return the evidence of title to the offered land to you, and will cause to be issued a quit claim deed for the land conveyed to the United States, pursuant to Section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. 872).

Sincerely yours,

(Sgd) JOHN A. CARVER, JR.
Assistant Secretary of the Interior.

Mr. Perley M. Lewis
213 North First Avenue
Room 17, Lower Floor
Phoenix 3, Arizona

APPENDIX B

STATUTES AND REGULATION INVOLVED

Section 8(b) of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. 315g(b), provides:

> When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

Section 6 of the Act of April 28, 1930, 46 Stat. 257, as amended, 43 U.S.C. 872, provides:

> Where a conveyance of land has been made or may hereafter be made to the United States in connection with an application for amendment of a patented entry or entries, or an exchange of lands, or for any other purpose, and the application in connection with which the conveyance was made is thereafter withdrawn or rejected, the Secretary of the Interior or such officer as he may designate is authorized and directed, if the deed of conveyance has been recorded, to execute a quitclaim deed of the conveyed land to the party or parties entitled thereto.

43 C.F.R. (1954 rev.) 146.3(b) provides:

> The authorized officer, if he has no basis to determine that the value of the selected land

exceeds the value of the offered lands, that the exchange is not in the public interest, or that there is other reason not to do so, shall direct publication of the notice of exchange in the newspaper or newspapers designated by him, and require the applicant to submit proof of publication and comply with the provisions of §§ 146.4, 146.5 and 146.7. However, until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States other than an obligation to pay one-half the cost of publication.

U.S. GOVERNMENT PRINTING OFFICE: 1970